Supreme Court, U.S.
FILED
APR 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-61.

In the

Supreme Court of the United States.

OCTOBER TERM, 1986.

COMMONWEALTH ELECTRIC COMPANY,
PETITIONER,

v.

DEPARTMENT OF PUBLIC UTILITIES OF
THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Petitioner's Reply Memorandum.

SANDER A. RIKLEEN,
(Counsel of Record),
HAROLD B. DONDIS,
FRANKLIN M. HUNDLEY,
ERIC J. KRATHWOHL,
RICH, MAY, BILODEAU & FLAHERTY, P.C.,
294 Washington Street,
Boston, Massachusetts 02108.
(617) 482-1360

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Table of Contents.

Table of Authorities Cited i

Discussion 2

A. *This Case Is Not Atypical* 2

1. Many Electric Companies Are Both Wholesalers and Retailers 2

2. The Decision Below Was Not Based on State Commission Interpretation of a Federal Rate 4

B. *The Issues Presented in This Case Are Important* 5

C. *Certiorari Should Be Granted* 6

Conclusion 7

Table of Authorities Cited.

CASES.

Attorney General v. *New England Power Company*, 33 FERC (CCH) ¶ 63.042 (1985) 4n

Boroughs of Ellwood City v. *F.E.R.C.*, 731 F.2d 959 (D.C. Cir. 1984) 3n

Cambridge Electric Light Co., M.D.P.U. 85-2F-1 (1986) 4n

Cities of Batavia v. *F.E.R.C.*, 672 F.2d 64 (D.C. Cir. 1982) 3n

City of Groton v. *Connecticut Light & Power Co.*, 497 F.Supp. 1040 (D. Conn. 1980), *rev'd in part*, 662 F.2d 921 (2d Cir. 1981) 3n

Eastern Edison Co. v. *Department of Public Utilities*, 388 Mass. 292, 446 N.E.2d 684 (1983) 5

Kansas Cities v. *F.E.R.C.*, 723 F.2d 82 (D.C. Cir. 1983) 3n

TABLE OF AUTHORITIES CITED.

Minnesota Power & Light Company, 11 FERC (CCH) ¶ 61,312 (1980) 3n, 4n

Mississippi Industries v. *F.E.R.C.*, 808 F.2d 1525 (D.C. Cir. 1987), *petitions for cert. filed*, Nos. 86-1380 and 86-1424, *reh'g granted*, No. 85-1611 (D.C. Cir. Apr. 3, 1987) 3n

Nantahala Power & Light Co. v. *Thornburg*, ___ U.S. ___ (No. 85-568, June 17, 1986) 2, 3n, 5, 7

New England Power Company, 31 FERC (CCH) ¶ 61,047 (1985), *aff'd sub nom.*, *Violet* v. *F.E.R.C.*, 800 F.2d 280 (1st Cir. 1986) 4n

Otter Tail Power Co. v. *U.S.*, 410 U.S. 366 (1973), *reh'g denied*, 411 U.S. 910 (1973) 3n

Southern California Edison Company, 8 FERC (CCH) ¶ 61,198 (1979), *aff'd sub nom.*, *Anaheim* v. *F.E.R.C.*, 669 F.2d 799 (D.C. Cir. 1981) 3n, 4n

Virginia Electric & Power Company, 19 FERC (CCH) ¶ 61,333 (1982) 3n, 4n

STATUTES.

Federal Power Act, §§ 205, 206, 207, 306, 16 U.S.C. §§ 824d, 824e, 824f and 825e 4n

No. 86-61.

In the

Supreme Court of the United States.

OCTOBER TERM, 1986.

COMMONWEALTH ELECTRIC COMPANY,
PETITIONER,

v.

DEPARTMENT OF PUBLIC UTILITIES OF
THE COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Petitioner's Reply Memorandum.

The Petitioner, Commonwealth Electric Company ("Com/Electric"), hereby submits this Reply Memorandum to respond to the Solicitor General's arguments that this case presents an "atypical" fact pattern and that it is not, therefore, appropriate to review the "troubling" aspects of the decision below on certiorari. Com/Electric submits that this case presents a clear challenge to the "bright line" between federal and state jurisdiction over electric utilities, which challenge is likely to recur

in numerous cases if this Court does not address the question left open in *Nantahala Power & Light Co.* v. *Thornburg*, ___ U.S. ___ (No. 85-568, June 17, 1986) (that decision left open the question of a state commission's jurisdiction to "trap" a retail electric company's purchased power costs when retailer imprudence is alleged to exist, slip opinion at 19).

Discussion.

Although the Solicitor General disagrees with many of the statements appearing in the decisions below and in the Respondent's Brief in Opposition,[1] he argues that certiorari should be denied because this case is "atypical" (SG Br. 12). The Solicitor General is mistaken.

A. *This Case Is Not Atypical.*

1. Many Electric Companies Are Both Wholesalers and Retailers.

The Solicitor General argues that this case is atypical because the imprudent wholesaler (BECO) was both a wholesaler sub-

[1] The decision below relies heavily on Com/Electric's "nondelegable" state law duties as the legal basis for the MDPU decision (Pet. App. 7a n.2, 8a n.3, 9a n.4, 10a, 12a, 13a, 14a; see also MDPU decision, Pet. App. 41a, and Br. in Opp. 13). The Solicitor General does not believe that nondelegable state law duties were the true basis for the decision below, *see* note 4, *infra*, but strongly disagrees that nondelegable duties could ever be the basis for such a decision (SG Br. 9 n.6).

The decision below and Brief in Opposition state that only issues of state law and retailer prudence are involved, and that FERC has no jurisdiction over the dispute in this case (Pet. App. 20a-21a, 22a; Br. in Opp. 10, 17-18). The Solicitor General disagrees and states that FERC does have jurisdiction over the dispute in this matter but that there is dual jurisdiction over this dispute until state commission jurisdiction is displaced by a request that FERC exercise its jurisdiction (SG Br. 9-10, 10 n.7 & n.8).

ject to the jurisdiction of FERC and a retailer subject to the jurisdiction of the Respondent (MDPU) (SG Br. 7, 12). Contrary to the Solicitor General's suggestion, this case does not present an atypical fact pattern. Electric utilities frequently act as both wholesalers and retailers, thus coming under the dual jurisdiction of both FERC and state utility commissions. Examples are abundant throughout the country.[2] Thus, in many cases a state commission has an opportunity to consider the prudence of an electric company which serves as both a retailer and a wholesaler.

If undisturbed, the decision below will, at a minimum, permit state commissions to determine the prudence of wholesalers over whom they have retail jurisdiction, to rely on local law

[2] As this Court pointed out in *Nantahala*, Nantahala Power & Light Company was both a retailer subject to the jurisdiction of the Utilities Commission of North Carolina and a wholesaler subject to the jurisdiction of FERC (slip opinion at 1 & 3). Similarly, the four operating companies in the Middle South Utilities system (Louisiana Power & Light Co., New Orleans Public Service, Inc., Arkansas Power & Light Co., and Mississippi Power & Light Co.) all sell electricity at wholesale and retail. *Mississippi Industries* v. *F.E.R.C.*, 808 F.2d 1525, 1528 (D.C. Cir. 1987), *petitions for cert. filed*, Nos. 86-1380 and 86-1424, *reh'g granted*, No. 85-1611 (D.C. Cir. Apr. 3, 1987). Price squeeze cases always involve utilities selling at wholesale and at retail. *See, e.g., Boroughs of Ellwood City* v. *F.E.R.C.*, 731 F.2d 959 (D.C. Cir. 1984) (Pennsylvania Power Company); *Kansas Cities* v. *F.E.R.C.*, 723 F.2d 82 (D.C. Cir. 1983) (Kansas Gas and Electric Company); *Cities of Batavia* v. *F.E.R.C.*, 672 F.2d 64 (D.C. Cir. 1982) (Commonwealth Edison Company); *City of Groton* v. *Connecticut Light & Power Co.*, 497 F.Supp. 1040 (D. Conn. 1980), *rev'd in part*, 662 F.2d 921 (2d Cir. 1981) (Connecticut Light & Power Company). For other examples of utilities selling electricity at wholesale and at retail see, *Otter Tail Power Co.* v. *U.S.*, 410 U.S. 366, 368 (1973), *reh'g denied*, 411 U.S. 910 (1973) (a retail electric company selling power in Minnesota, North Dakota and South Dakota was enjoined from refusing to sell power at wholesale in the same states); *Virginia Electric & Power Company*, 19 FERC (CCH) ¶ 61,333, at 61,640 (1982) (approving a wholesale fuel adjustment clause similar to that used for the same utility's Virginia retail customers); *Minnesota Power & Light Company*, 11 FERC (CCH) ¶ 61,312, at 61,645 (1980) (involving FERC review of wholesale rates for the 15% of the utility's business which is not retail sales); *Southern California Edison Company*, 8 FERC (CCH) ¶ 61,198, at 61,680 (1979), *aff'd sub nom., Anaheim* v. *F.E.R.C.*, 669 F.2d 799 (D.C. Cir. 1981) (involving FERC review of wholesale rates for the 10% of the utility's customers who are not subject to the jurisdiction of the California Public Utilities Commission).

to impute any imprudence found to other retailers who purchase power from the first company (even though there has been no decision by FERC adjudicating wholesale imprudence), and to penalize the retailers for their wholesaler's "imprudence." The effect will be to "trap" retailer costs since a state commission has no jurisdiction to prevent the "imprudent" wholesaler from charging its retailer customers the FERC approved tariff.[3]

2. The Decision Below Was Not Based on State Commission Interpretation of a Federal Rate.

Contrary to the Solicitor General's position (SG Br. 7 n.4, 9, 9 n.6), the decisions of the MDPU and of the court below were not based upon interpretation of the applicable federal rate (the Pilgrim Contract). Close reading of the decision below

---

[3] Com/Electric submits that state commissions are preempted from acting as the MDPU did in this case. FERC has jurisdiction to determine wholesaler imprudence, *see* Federal Power Act §§ 205, 206, 207 and 306, 16 U.S.C. §§ 824d, 824e, 824f and 825e; *see also, Attorney General* v. *New England Power Company*, 33 FERC (CCH) ¶ 63,042 (1985), and is not bound by state commission findings, in proceedings within their jurisdiction, that the same utility was imprudent for retail purposes. *Minnesota Power & Light Company*, 11 FERC (CCH) ¶ 61,312, at 61,645 (1980). *See also, Virginia Electric & Power Company*, 19 FERC (CCH) ¶ 61,333 (1982); *Southern California Edison Company*, 8 FERC (CCH) ¶ 61,198 (1979), *aff'd sub nom., Anaheim* v. *F.E.R.C.*, 669 F.2d 799 (D.C. Cir. 1981). FERC also has declined to impute an MDPU finding of BECO's imprudence as a retailer to one of BECO's wholesale customers. *New England Power Company*, 31 FERC (CCH) ¶ 61,047, at 61,080 and 61,085 (1985), *aff'd sub nom., Violet* v. *F.E.R.C.*, 800 F.2d 280 (1st Cir. 1986).

The mischief caused by the case before the Court is extensive since the Respondent believes that it has jurisdiction to determine the prudence of out-of-state wholesalers over whom it has no retail jurisdiction and to impute such imprudence to a retailer over whom it does have jurisdiction. Thus, in *Cambridge Electric Light Co.*, M.D.P.U. 85-2F-1 (1986), appeal docketed at the Massachusetts Supreme Judicial Court as C.A. No. 86-115, the MDPU inquired into the prudence of a Connecticut wholesaler, found the wholesaler to be imprudent, imputed such imprudence to the Massachusetts retailer based upon local law (including the MDPU decision which is the subject of the Petition before this Court), and on that basis restricted the retailer's recovery of replacement power costs incurred during an outage at the Connecticut wholesaler's plant. The Solicitor General apparently agrees with Petitioner that such action by a state commission is improper (SG Br. 8 n.4).

discloses that no attempt was made to interpret the Pilgrim Contract. The MDPU did not attempt to adjudicate any rights between the parties to the Pilgrim Contract. Instead, the MDPU merely examined the Pilgrim Contract to see if it contained sufficient provisions to permit Com/Electric to be charged with BECO's imprudence under state law. Thus, contrary to the Solicitor General's position, this case does not involve state commission interpretation of a federal contract in the absence of a FERC interpretation.

The issue presented by this case is the one which Petitioner has posed — whether, in the absence of any retailer imprudence, federal law permits a state commission to determine a wholesaler's imprudence and then impute that imprudence to the retailer. If undisturbed, the decision below will permit state commissions to use local legal doctrines as a basis for inquiry into imprudence anywhere in the chain of electric supply.

B. *The Issues Presented in This Case Are Important.*

When this case is viewed in its proper light, it is apparent that it presents a serious threat to the Filed Rate Doctrine, the Narragansett Doctrine, this Court's recent decision in *Nantahala,* and the decisions cited therein. Although *Nantahala* forcefully rejected state commission efforts to "trap" retailer costs, that case did not address situations in which imprudence has been alleged or found. The court below held that its own Filed Rate Doctrine case, *Eastern Edison Co.* v. *Department of Public Utilities,* 388 Mass. 292, 446 N.E.2d 684 (1983) was not controlling because no question of imprudence had been raised in *Eastern Edison* (19a n.11). The questions raised by this case are, thus, significant ones affecting the national system of wholesale electric supply.

This case presents the Court with an opportunity to examine and decide the extent of a state commission's jurisdiction to

"trap" a retailer's costs based on a wholesaler's alleged imprudence. The states should not be permitted to adopt and expand upon the analysis of the Massachusetts court because of an absence of guidance from this Court.

C. *Certiorari Should Be Granted.*

Petitioner respectfully submits that the writ should be granted and the case set down for full briefing and argument on the merits. In the alternative, Com/Electric submits that this Court should grant the writ of certiorari and remand the case for reconsideration. The reasoning of the decision below is unclear[4]

[4] The Solicitor General charitably describes the decision below as "not . . . entirely clear" (SG Br. 6) and "troubling" (SG Br. 9). It is more than that.

The MDPU Brief in Opposition, Dissent below and the Solicitor General do not agree on the basis for the majority's decision below. The Brief in Opposition suggests that the decision below was based on a state law conclusion that Com/Electric shares the responsibility for the imprudence of its wholesale supplier (Br. in Opp. 4, 11). The Dissent below seems to believe that the majority's decision was based on Com/Electric's imprudence in entering into a FERC filed contract which made it assume the risk of service interruptions (Pet. App. 26a). The Solicitor General believes that the decision below was based on MDPU's interpretation of the Pilgrim Contract (SG Br. 7 n.4, 9, 9 n.6).

Furthermore, although not discussed by the Solicitor General, the decision below and Brief in Opposition place great emphasis on cases holding that state commissions are not preempted from considering the prudence of a retailer's choice among supply options (Pet. App. 19a-20a (majority), 24a-26a (dissent); Br. in Opp. 6, 14-17), but this case involves no issue of imprudent retailer choice or actions. It is undisputed that the MDPU did *not* make any finding that Com/Electric had been imprudent in any of its own actions (Pet. App. 42a). There has been no suggestion that Com/Electric made an imprudent decision when it entered the Pilgrim Contract or when it decided among replacement power alternatives during the Pilgrim 1 outage. In fact, the record demonstrates that the Pilgrim Contract had provided low cost power for Com/Electric's customers for over a decade and that 80% of the replacement power purchased by Com/Electric was the cheapest oil-generated power in New England.

The dissenting judge below seems to have been troubled by the majority's discussion of imprudent choice since he would have remanded the case to see if Com/Electric had made any imprudent choice among supply options (Pet. App. 25a-26a).

and such decision was issued before this Court issued *Nantahala*. Therefore, the decision below does not discuss whether the MDPU impermissibly caused Com/Electric to suffer "trapped costs" in violation of *Nantahala*.[5] Accordingly, if this Court declines to set this case down for briefing on its merits, the case should be remanded for reconsideration.

Conclusion.

For the foregoing reasons, the writ of certiorari should be granted and the case either (i) set down for briefing on its merits, or (ii) remanded to the Massachusetts Supreme Judicial Court with instructions that the case be reconsidered in light of this Court's recent *Nantahala* decision.

Respectfully submitted,

SANDER A. RIKLEEN,
(Counsel of Record),
HAROLD B. DONDIS,
FRANKLIN M. HUNDLEY,
ERIC J. KRATHWOHL,
RICH, MAY, BILODEAU &
FLAHERTY, P.C.,
294 Washington Street,
Boston, Massachusetts 02108.
(617) 482-1360

Dated: April 28, 1987

---

[5] The time for reconsideration of the decision below had passed before *Nantahala* was issued. Petitioner's out of time request that the decision below be reconsidered in light of *Nantahala* was denied without comment just eight days after it was filed.